No. 03-525

In the Supreme Court of the United States

ANTONIO ROSARIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's sentence should be vacated for a violation of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), when the violation did not prejudice petitioner because the Sentencing Guidelines would have required the district court to impose the same sentence absent the violation.

2. Whether the court of appeals correctly held that the evidence at trial was sufficient to establish that petitioner distributed crack cocaine.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-53) is reported at 330 F.3d 964.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2003. A petition for rehearing was denied on July 9, 2003 (Pet. App. 54). The petition for a writ of certiorari was filed on October 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of one count of conspiracy to distribute crack cocaine, in violation of 21 U.S.C. 846; two counts of using minors in a drug operation, in violation of 21

U.S.C. 861(a)(1) and (2); and one count of distributing crack cocaine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2-3, 5. The district court sentenced petitioner to 360 months of imprisonment on the conspiracy count and the use-of-minors counts and to 240 months of imprisonment on the crack distribution count, all to be served concurrently. *Id.* at 34. The court of appeals affirmed. *Id.* at 34-37.

1. Petitioner was the leader of a violent Chicago street gang known as the Project Latin Kings, which controlled the sale of crack cocaine in the Chicago Housing Authority's Lathrop Homes. Pet. App. 2-4. On September 18, 1997, after a two-year joint investigation by federal and local law enforcement, petitioner and twenty of his fellow gang members were indicted on thirty-four drug-related charges. *Id.* at 2-3.

At a four-week jury trial, the government produced substantial evidence explaining how the drug conspiracy worked. Former gang members testified that the gang used force or the threat of force to keep anyone other than members of the Project Kings from selling drugs in the Lathrop Homes. On certain days, called "Nation Days," all members of the gang were required to sell crack cocaine and to remit the proceeds to the gang's treasury. The profits from Nation Days were used to provide money to gang members in custody, to buy additional drugs and guns, to pay for gang apparel, and to fund parties and trips for gang members. Pet. App. 3.

In 1995, petitioner was elected to the head position in the gang's hierarchy, called the "Inca." As Inca, he was responsible for appointing other officers and ensuring that they were doing their jobs. He also led gang meetings at which Nation Days were planned and other gang business was discussed. Pet. App. 4.

The jury heard testimony from two chemists who analyzed the narcotics purchases at issue in the conspiracy. Chemist John Meyers testified that the substances at issue contained cocaine base. Tr. 2548-2549. Chemist Jack Raney also testified that the substances contained cocaine base, Tr. 2581-2583, and added that he used the term "cocaine base" when identifying "crack," Tr. 2586. Raney also explained that the terms "cocaine base" and "crack" are interchangeable in street parlance. Tr. 2586. Cooperating witnesses repeatedly testified about the gang members' sales of "crack" cocaine throughout the trial. See, *e.g.*, Tr. 700-703, 707, 721-723, 725, 1235-1237, 1239-1242, 1245, 1447-1451, 1800-1801, 1804-1805, 2259, 2293.

The jury instructions did not require the jury to find the specific drug quantity involved in the conspiracy. Pet. App. 29. The district court determined that petitioner was accountable for the distribution of 149.3 grams of cocaine base, which resulted in a base offense level of 32. Presentence Report (PSR) 10. After appropriate adjustments, petitioner's total offense level was calculated at 40. PSR 11. That offense level, combined with his criminal history category of V, resulted in a Guidelines sentencing range of between 360 months and life imprisonment. PSR 22. The court sentenced petitioner to 360 months of imprisonment on the conspiracy count and on each use-of-minors count and to 240 months of imprisonment on the crack distribution count, all to be served concurrently. Pet. App. 34.

2. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 1-53. The court rejected petitioner's argument that his sentence should be vacated because his 360-month sentence on the drug conspiracy count violated *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Pet. App. 34-37. Employing plain error

review because of petitioner's failure to raise the *Apprendi* issue in the district court, the court of appeals concluded that petitioner's sentence should not be vacated because the imposition of a 360-month sentence did not prejudice petitioner. *Ibid.*

The court agreed with petitioner that his maximum statutory sentence under 21 U.S.C. 841(b)(1)(C) for the drug conspiracy count was 20 years because the jury did not determine drug quantity. Pet. App. 34. The court reasoned, however, that, even if the district court had not exceeded the statutory maximum sentence for that count, it would have had to impose the same 360-month prison term. *Id.* at 36. The court explained that the 360-month sentence was the bottom of petitioner's Guidelines range, and Sentencing Guidelines § 5G1.2(d) requires the sentencing court to run the sentences on multiple counts consecutively rather than concurrently to the extent necessary to impose the Guidelines sentence. Pet. App. 36-37. Thus, even if the statutory maximum on all the counts were 20 years (240 months), the Guidelines would have required the district court to impose a sentence of 240 months on the conspiracy count (or one of the other counts) and a consecutive 120-month sentence on one or more of the other counts in order to reach a 360-month sentence. *Id.* at 37.

In addition to rejecting petitioner's *Apprendi* claim, the court also rejected petitioner's other arguments. As relevant here, the court rejected petitioner's contention that the government introduced insufficient evidence to establish that the substance that petitioner and the other gang members distributed was crack cocaine. Pet. App. 53.

ARGUMENT

1. Petitioner first contends (Pet. 7-13) that he is entitled to be resentenced because his 360-month term on the drug conspiracy count was imposed in violation of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). He further contends that there is a circuit conflict over the court of appeals' reasoning that resentencing was not required because petitioner was not prejudiced by the *Apprendi* violation. Those claims lack merit and further review of petitioner's *Apprendi* claim is not warranted.

a. The court of appeals concluded that, even if the district court had imposed a 20-year sentence on the drug conspiracy count in accordance with *Apprendi*, Sentencing Guidelines § 5G1.2(d) would have required the district court to impose the same 360-month sentence by running the sentences on some of his counts consecutively. Petitioner argues that the court's interpretation of that Guideline conflicts with the decisions of other courts of appeals (Pet. 7-11) and with 18 U.S.C. 3584(a) (Pet. 11-13). Even if petitioner's contentions were correct (which, as discussed below, they are not), the court of appeals' conclusion that petitioner is not entitled to resentencing would still be correct.

In *Apprendi*, this Court held, as a matter of constitutional law, that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Because the jury did not determine the quantity of drugs involved in the crack cocaine conspiracy, the maximum sentence that could be imposed on petitioner for the conspiracy count

consistent with *Apprendi* was 20 years. See 21 U.S.C. 841(b)(1)(C).

Petitioner did not, however, raise his *Apprendi* claim in the district court, so he is entitled to reversal of his sentence only if he meets the plain-error standard. See Fed. R. Crim. P. 52(b). To meet that standard, he must show (1) that there was error, (2) that the error was "plain," (3) that the error affected his "substantial rights," and (4) that the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)); see *United States* v. *Cotton*, 535 U.S. 625, 631-633 (2002). As the court of appeals concluded (Pet. App. 34-37), petitioner cannot satisfy the plain-error test because he would still receive a 360-month sentence even if he were sentenced in accordance with *Apprendi*.*

Although *Apprendi* limits petitioner's punishment for the drug conspiracy count (and the drug distribution count) to 20 years because of the absence of a jury finding on drug quantity, petitioner was also convicted

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* Petitioner suggests (Pet. 13 n.3) that the court of appeals should not have applied the plain-error standard because petitioner moved to adopt his co-defendants' pre- and post-trial motions, and one co-defendant requested that the district court instruct the jury to make a finding on the amount of drugs sold. Even if that were enough to preserve the *Apprendi* error on petitioner's behalf, petitioner would still not be entitled to reversal of his sentence because the *Apprendi* error was harmless beyond a reasonable doubt for the same reason that petitioner does not satisfy the plain-error standard. See *United States* v. *Diaz*, 296 F.3d 680, 683 n.4 (8th Cir.) (en banc), cert. denied, 537 U.S. 940 and 1095 (2002); see also *United States* v. *Lafayette*, 337 F.3d 1043, 1050 n.12 (D.C. Cir. 2003) (meaning of "prejudice" under plain-error and harmless-error standards is same).

of two counts of using minors in the drug offenses, in violation of 21 U.S.C. 861(a)(1) and (2). The statutory maximum penalty for the use-of-minors counts was 40 years (twice the maximum on the underlying drug offenses). See 21 U.S.C. 861(b). Under the federal Sentencing Guidelines, the district court must impose the sentence dictated by the Guidelines on each count for which the Guidelines sentence is less than or equal to the statutory maximum. Sentencing Guidelines § 5G1.2(b). If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the "total punishment" as determined in accordance with the Guidelines, then the sentences on all the counts run concurrently. *Id.* § 5G1.2(c). Petitioner's minimum Guidelines sentence was 360 months, PSR 22, which was below the statutory maximum of 40 years for the use-of-minors counts. The district court was therefore required to sentence petitioner to a 360-month sentence on each of those counts (to run concurrently), which the court did. Consequently, even if petitioner's concurrent sentence on the drug conspiracy count were limited to 20 years in accordance with *Apprendi*, he would still be subject to 360 months of imprisonment. Because the *Apprendi* error had no impact on the length of petitioner's sentence, he cannot show prejudice or entitlement to relief under any standard of review, regardless of the merit of his challenge to the consecutive-sentencing rationale employed by the court of appeals.

b. Contrary to petitioner's contention (Pet. 7-13), the court of appeals correctly held that petitioner was entitled to no relief because his 360-month sentence would have been achieved by consecutive sentencing if no single count carried a long enough maximum term to reach the Guidelines sentence. Sentencing Guidelines

§ 5G1.2(d) provides that, if the statutory maximum on the count of conviction carrying the greatest sentence is less than the "total punishment" as determined under the Guidelines, the district court must run the sentences on multiple counts consecutively to the extent necessary to achieve the Guidelines' total punishment.

The overwhelming majority of courts of appeals that have addressed the issue have held that consecutive sentencing under Guidelines § 5G1.2(d) is mandatory. See *United States* v. *Garcia-Torres*, 341 F.3d 61, 74-75 (1st Cir. 2003), cert. denied, 124 S. Ct. 1467 (2004); *United States* v. *Lafayette*, 337 F.3d 1043, 1044-1045 (D.C. Cir. 2003); *United States* v. *Garcia*, 322 F.3d 842, 843 (5th Cir. 2003); *United States* v. *Diaz*, 296 F.3d 680, 684 (8th Cir.) (en banc), cert. denied, 537 U.S. 940 and 1095 (2002); *United States* v. *Buckland*, 289 F.3d 558, 570-572 (9th Cir.) (en banc), cert. denied, 535 U.S. 1105 (2002); *United States* v. *Outen*, 286 F.3d 622, 639-640 (2d Cir. 2002); *United States* v. *Price*, 265 F.3d 1097, 1109 (10th Cir. 2001), cert. denied, 535 U.S. 1099 (2002); *United States* v. *Angle*, 254 F.3d 514, 518 (4th Cir.) (en banc), cert. denied, 534 U.S. 937 (2001); *United States* v. *Gallego*, 247 F.3d 1191, 1200 n.19 (11th Cir. 2001), cert. denied, 534 U.S. 1084, 535 U.S. 1095 and 1113 (2002); *United States* v. *Page*, 232 F.3d 536, 545 (6th Cir. 2000), cert. denied, 532 U.S. 935, 1023 and 1056 (2001); see also *United States* v. *Veysey*, 334 F.3d 600, 602 (7th Cir. 2003) ("The federal sentencing guidelines direct the judge, when there are multiple counts of conviction, to impose maximum and consecutive sentences to the extent necessary to make the total punishment equal in severity to what the guidelines would require were it not for the statutory maxima.") (citations omitted), cert. denied, 124 S. Ct. 1102 (2004).

Contrary to petitioner's contention (Pet. 7-11), there is at this time no clear conflict in the courts of appeals on whether consecutive sentencing under Sentencing Guidelines § 5G1.2(d) is mandatory or discretionary. The Fifth Circuit recently clarified that Guidelines "§ 5G1.2(d) requires that the district court impose consecutive sentences to equal the 'total punishment' prescribed by the Guidelines when the maximum sentence required by the substantive criminal statute falls short of the minimum sentence required by the applicable Sentencing Guideline Range." *Garcia*, 322 F.3d at 843. The court explained that its earlier decision in *United States* v. *Vasquez-Zamora*, 253 F.3d 211 (5th Cir. 2001), on which petitioner relies to support his claim of a conflict (Pet. 8, 10), only "preserved the district court's discretion to decide whether to impose concurrent or consecutive sentences so long as the statutory maximum does not conflict with the minimum total punishment required by the Guidelines." *Garcia*, 322 F.3d at 846.

In *United States* v. *Velasquez*, 304 F.3d 237, 241-246 (3d Cir. 2002), cert. denied, 538 U.S. 939 (2003), the other case on which petitioner relies for his claim of a conflict (Pet. 8, 10), the Third Circuit held that 18 U.S.C. 3584 provided the district court with discretionary authority to impose concurrent sentences notwithstanding Sentencing Guidelines § 5G1.2(d). See 18 U.S.C. 3584(a) (providing, in pertinent part, that multiple terms of imprisonment imposed at same time "may run concurrently or consecutively" and creating a presumption of concurrent sentences "unless the court orders or the statute mandates that the terms are to run consecutively"). In a more recent case, however, the Third Circuit declined to set aside a sentence because of an asserted *Apprendi* error, and held that,

"even if *Apprendi* applied, the Guidelines would have required the district court to impose a consecutive sentence on the remaining counts of conviction to achieve the [Guidelines] sentence." *United States* v. *Jenkins*, 333 F.3d 151, 155 (3d Cir.), cert. denied, 124 S. Ct. 350 (2003). The law in the Third Circuit thus appears to be unsettled. See *Lafayette*, 337 F.3d at 1050 n.12 ("Although the Third Circuit held to the contrary in *Velasquez*, * * * it recently took the same position as the other circuits in * * * *Jenkins*."). There is therefore no conflict among the courts of appeals that warrants this Court's review at this time.

c. Petitioner is also incorrect in asserting (Pet. 11-13) that Sentencing Guidelines § 5G1.2(d) conflicts with 18 U.S.C. 3584(a). The district court's discretion under Section 3584(a) to impose concurrent or consecutive sentences is not unlimited. Section 3584(b) states that the district court, "in determining whether the terms imposed are to be ordered to run concurrently or consecutively, *shall consider* * * * the factors set forth in [18 U.S.C.] section 3553(a)." 18 U.S.C. 3584(b) (emphasis added). Section 3553(a), in turn, requires the district court to consider the "kinds of sentences and the sentencing ranges established for" the defendant in the Sentencing Guidelines. 18 U.S.C. 3553(a)(4). Section 3553(b) gives content to that instruction by directing that a sentencing court "*shall impose* a sentence of the kind, and within the range, referred to in subsection (a)(4) [the Guidelines]," unless a ground for departure exists. 18 U.S.C. 3553(b)(1) (emphasis added).

Thus, a district court must exercise its discretion under Section 3584(a) to choose between consecutive and concurrent sentences in accordance with limitations imposed by the Guidelines. Sentencing Guidelines § 5G1.2(d) is such a limitation. See 28 U.S.C.

994(a)(1)(D) (authorizing the Sentencing Commission to promulgate guidelines to determine whether multiple sentences should be ordered to run concurrently or consecutively); *Lafayette*, 337 F.3d at 1050-1052; see also *United States* v. *Pedrioli*, 931 F.2d 31, 33 (9th Cir. 1991) ("Reading § 3584(a) to provide the district court with absolute discretion to ignore the guidelines would * * * render nugatory the guidelines' recommendations as to when sentences should run concurrently or consecutively."). There is thus no conflict between Sentencing Guidelines § 5G1.2(d) and Section 3584(a).

Petitioner cites several decisions that state that district courts can exercise their departure authority under the Guidelines to run sentences concurrently. See Pet. 11 (citing *United States* v. *Perez*, 328 F.3d 96 (2d Cir. 2003) (per curiam), cert. denied, 124 S. Ct. 283 (2003)); *United States* v. *O'Hara*, 301 F.3d 563, 571 (7th Cir. 2002), cert. denied, 537 U.S. 1049 (2002); *United States* v. *Schaefer*, 107 F.3d 1280, 1285 (7th Cir. 1997), cert. denied, 522 U.S. 1052 (1998)). But the decisions cited by petitioner "do not permit a broad discretion * * * to trump section 5G1.2; they simply permit a departure if the [ordinary] standards for a departure are met, *i.e.*, the sentencing judge finds that the case 'presents an aggravating or mitigating circumstance, of a kind or to a degree, not adequately taken into consideration by the Sentencing Commission.'" *United States* v. *Rahman*, 189 F.3d 88, 156 (2d Cir.) (per curiam) (quoting 18 U.S.C. 3553(b)), cert. denied, 528 U.S. 982 (1999), 528 U.S. 1094 (2000). See *Koon* v. *United States*, 518 U.S. 81, 92-96 (1996) (discussing general departure authority under the Guidelines). The cases cited by petitioner thus do not support petitioner's contention that Sentencing Guidelines § 5G1.2(d) conflicts with Section 3584(a). Indeed, they all reject the

argument that Sentencing Guidelines § 5G1.2(d) or some other Guidelines limitation on the imposition of concurrent sentences conflicts with that statute. See *Perez*, 328 F.3d at 97; *O'Hara*, 301 F.3d at 571-572; *Schaefer*, 107 F.3d at 1285. See also *Pedrioli*, 931 F.2d at 32 (citing additional cases).

d. The interplay between Section 3584(a) and Guidelines § 5G1.2(d) in plain-error cases involving *Apprendi* error is essentially a transitional one. Since this Court's decision in *Apprendi*, federal prosecutors have routinely obtained findings on threshold drug quantity from both the grand jury and the petit jury in cases in which sentencing will be governed by the penalty provisions of 21 U.S.C. 841(b). Thus, the question of the application of plain-error analysis to a claim that a defendant's sentence under Section 841(b) violated *Apprendi* is unlikely to arise with any frequency in the future. For that reason as well, this Court's review of petitioner's *Apprendi* claim is not warranted.

2. Petitioner also renews his claim (Pet. 14-16) that the government presented insufficient evidence at trial to establish that he and his cohorts were trafficking in "crack" rather than some other form of cocaine. That claim does not warrant further review.

Although petitioner asserts (Pet. 14) that the court of appeals failed to apply the appropriate standard in reviewing his sufficiency challenge, he provides no support for that assertion, and there is no indication in the court's opinion that it applied an incorrect standard. Petitioner's sufficiency issue thus boils down to a claim that "the record does not adequately justify the court of appeals' summary conclusion" that the evidence was sufficient. Pet. 16. That fact-bound contention does not warrant this Court's review and lacks merit in any event.

The evidence is sufficient to support a finding of guilt if, "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). "[T]he primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals." *Hamling* v. *United States*, 418 U.S. 87, 124 (1974).

To the extent that petitioner is challenging (Pet. 14) the sentencing judge's determination of the type of drug involved in the offense for purposes of applying the Sentencing Guidelines, see *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) ("The Sentencing Guidelines instruct *the judge* in a case like this one to determine both the amount and the kind of 'controlled substances' for which a defendant should be held accountable—and then to impose a sentence that varies depending upon the amount and kind."), the judge may make that determination by a preponderance of the evidence. See *United States* v. *Watts*, 519 U.S. 148, 156-157 (1997) (per curiam). Review of the judge's factual determination is under the deferential clear-error standard. See *United States* v. *Linton*, 235 F.3d 328, 329 (7th Cir. 2000). This Court does not review the concurrent factual findings of two courts below "in the absence of a very obvious and exceptional showing of error." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996).

Here, the court of appeals correctly held that "the government did introduce sufficient evidence to establish that crack cocaine was the substance that [petitioner] and the other gang members distributed." Pet. App. 53. The record is replete with testimony from chemists and cooperating witnesses that petitioner and

his gang were distributing crack cocaine. Two chemists testified that the substance petitioner and his co-defendants were distributing contained cocaine base. Tr. 2548-2549, 2581-2583. One of the chemists explained that he used the term "cocaine base" when identifying "crack," and that the terms "cocaine base" and "crack" are interchangeable in street parlance. Tr. 2586. Cooperating witnesses, including former gang members, repeatedly testified about the gang members' sales of "crack" cocaine throughout the trial. See, *e.g.*, Tr. 700-703, 707, 721-723, 725, 1235-1237, 1239-1242, 1245, 1447-1451, 1800-1801, 1804-1805, 2259, 2293. That evidence is more than adequate to support the jury verdict and the judge's finding that petitioner's offense involved crack cocaine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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